Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-261

TOM R. ROGERS,

Petitioner,

v.

UNITED STATES OF AMERICA,
SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

EMMETT COLVIN,
GARY D. JACKSON,
COLVIN & JACKSON,
1600 Adolphus Tower,
Dallas, Texas 75202,
Attorneys For Petitioner.

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Petition for Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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The Petitioner, TOM R. ROGERS, respectfully prays that a WRIT OF CERTIORARI issue to review the decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the trial court, entered in this proceeding on July 8, 1976.

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the trial court, is reported at 534 F. 2d 1134 (5th Cir. 1976). Said opinion and the court's denial of Petitioner's Petition for Rehearing are attached in the Appendix hereto.

JURISDICTION

The petitioner pled guilty to one count of criminal contempt [18 U.S.C. §401] on June 9, 1975, subject to the jurisdictional question he had raised. The United States Court of Appeals for the Fifth Circuit affirmed the judgment on July 8, 1976. On July 30, 1976, said court denied the Petitioner's Petition for Rehearing. This Court's jurisdiction is envoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should this Court exercise its supervisory power over the District Courts to ensure that such courts determine that a defendant involved in an injunctive proceeding, instigated by an agency of the United States Government, is represented by counsel and apprised of the consequences of entering into a permanent injunction by consent; so that in a subsequent contempt proceeding, the jurisdiction of the court cannot be contested on the basis of constitutional defects in the injunctive proceeding?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. §555(b): A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified

representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

STATEMENT OF THE CASE

On August 11, 1971, the Securities and Exchange Commission [hereinafter referred to as the SEC] filed suit No. CA 3-5027-A, requesting a permanent injunction against future violations of the federal securities laws against Capital Oil Corporation, three corporate principals and twelve other relatively minor salesmen, including Petitioner [ROA 80-94]. Before the actual filing of the injunctive action the three principals employed two private attorneys, who practiced civil securities law only, to represent the corporation, themselves, and all twelve of the salesmen.

Before and after the suit was filed, at sundry times, the two attorneys employed by the principals erroneously advised Petitioner [and presumably other minor defendants] as to the proper course of action to take in connection with the SEC investigation and the pending suit [ROA 25-26, 60, 101-102]. This advice consisted of a recommendation for Petitioner to consent to an injunction which was obviously not in the best interest of Petitioner. At various times, most of the defendants entered into written consents for the entry of a final judgment of permanent injunction as prayed for in the complaint filed by the SEC [ROA 75-77].

On or about June 19, 1972, presumably with the legal advice of the two attorneys mentioned above[1], Petitioner signed and entered into a Stipulation and Consent to an Order of Permanent Injunction [ROA 8, 76, 99]. Petitioner was at no time advised of or aware of the consequences and ramifications of the entering of a permanent injunction against him, particularly the potential *criminal* jeopardy as a result of such an injunction [ROA 25-26, 60, 101-102]. Neither the above mentioned counsel, the SEC, nor the Court advised the Petitioner that such an injunction could be used to place him in criminal jeopardy without the benefit of Constitutional guarantees, such as the right to be charged only after being indicted by a grand jury, and the statutory safeguards provided by Title 15 of the United States Code [ROA 25-27, 60, 101-103]. Petitioner, however, was apprised by the SEC that a potential conflict of interest existed.

On April 9, 1975, the Government, on instigation of the SEC, charged Petitioner with two counts of contempt of the above injunction [ROA 1-3]. Basically, the Petitioner was charged with substantive violations of Title 15 of the United States Code which were brought under the guise of a Title 18, §401, contempt of court charge. As a result, no criminal reference report was prepared, no evaluation was made by the Attorney General, no grand jury considered whether probable cause existed and no indictment was returned against Petitioner. On May 2, 1975, Petitioner filed a Motion to Dismiss the case [ROA 12-14], and on June 5, 1975 Appellant filed a Motion to Set Aside Injunction and Dismiss Criminal Case [ROA 24-27]. Even though the alleged contempt was an integral part of the injunctive proceedings, the contempt proceeding was docketed by the District Clerk

[1]The possibility that Petitioner was not afforded counsel at all, much less effective assistance thereof [see Ground of Error #1, in brief of Appellant before the Fifth Circuit], at the time he entered into the Stipulation and Consent to an Order of Permanent Injunction was evidenced by a letter addressed to the Honorable Joe E. Estes from Richard M. Hewitt, Assistant Regional Administrator of the Fort Worth Regional office of the SEC, dated June 9, 1972, filed June 12, 1972, but not included in the record on appeal because the filed copy disappeared. A copy, however, appears at p. 53, Br. of Appellant before the Fifth Circuit.

as a separate proceeding; therefore, the motion was filed in both cases. The injunctive case was pending before Honorable Robert Porter and the contempt was pending before Honorable Sarah Hughes. Judge Porter was requested to set the injunction aside and Judge Hughes was requested to dismiss the contempt case following such action by Judge Porter.

Even though the injunction suit was pending before Judge Porter, on June 9, 1974, Judge Hughes overruled and denied the Motion both as to the injunction and the contempt dismissal [ROA 37-38, 60, 71].

Subject to jurisdictional questions, Petitioner, on June 9, 1975, entered a plea of guilty to Count II of the information [ROA 39]. Count I was dismissed [ROA 66, 68].

On June 27, 1975, Judge Hughes sentenced Petitioner to five years, directing that confinement be six months in a jail type institution and that the remainder of the sentence be suspended with the Petitioner being on probation [ROA 62, 68]. Notice of Appeal from Judge Hughes' judgment and sentence was filed on June 27, 1975 [ROA 69], and Notice of Appeal from Judge Hughes' denial of the Motion to Set Aside Injunction and Dismiss Criminal Case was given and entered in the Order of Denial filed July 18, 1975 [ROA 71].

On July 18, 1975, Judge Porter, without hearing any evidence and apparently not considering the uncontroverted evidence which was heard by Judge Hughes, also denied the motion to set the injunction aside [ROA 105-106]. The Order of denial was filed on July 21, 1975, and Notice of Appeal was filed on July 25, 1975 [ROA 110].

On or about August 20, 1975, Petitioner filed a Motion to Consolidate the cases pending before the United States Court of Appeals for the Fifth Circuit. The Motion requested that the two cases be consolidated into a single case for purposes of appeal, record, briefing, argument and decision. On September 2, 1975, the Motion to Consolidate was granted.

On appeal to the Fifth Circuit, the Petitioner presented two points: (1) that the trial court lacked jurisdiction to hear the contempt charged against the Petitioner because the injunction was void due to the absence of effective assistance of counsel as evidenced by a conflict of interest therein and by the failure to advise Petitioner of the ramifications and potential consequences of violating the consent decree; and (2) that the trial court lacked jurisdiction to hear the contempt charges against Petitioner because such charges were essentially a willful circumvention of the provisions of 15 U.S.C. §§77t, 77u, thereby violating due process of law. On July 8, 1976, said Court affirmed the plea of guilty. A Petition for rehearing was denied by the Court of Appeals on July 30, 1976.

REASONS FOR GRANTING THE WRIT

This Court should exercise its supervisory power in a manner which would justify the affirmative of the long standing principle that the validity of a court's order is not subject to question in a contempt proceeding while furthering the ends of due process.

Courts have long adhered to the rule of law that the validity of an order of a court is not open to question in a contempt proceeding. *U.S. v. United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947); *U.S. v. Leyva*, 513 F. 2d 774, 776 (5th Cir. 1975). Apparently, the need to punish contemptuous conduct outweighs even an error respecting fundamental constitutional rights. *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *U.S. v. United Mine Workers, supra.*

Assuming *arguendo* that this Court will not address itself to whether the above rule should be overturned because the Petitioner was denied the effective assistance of counsel at the time such an order was issued, this Court should address the question of whether an exercise of this Court's supervisory power, in a manner that will justify reliance on such a rule, is desirable and necessary.

Specifically, a situation exists where the initial order is arguably void. Yet, Petitioner cannot collaterally attack the validity thereof. In *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968), the respondent town officials obtained an ex parte order restraining the petitioners therein for a ten day period. A rally, against which the restraining order had been obtained, was planned for the next day. Apparently no effort was made to communicate with the petitioners as to the restraining order. If the planned rally had occurred prior to notification of the ex parte injunction, they would have been chargeable with contempt under the law as it now stands. In fact, much like the present case, the initial order would have been voidable. Yet, if petitioners therein had gone through with the planned rally, they would have been unable to assert the invalidity of the ex parte order in a subsequent contempt proceeding.

The foregoing example is used to demonstrate the inherently unfair posture injunctive actions can put potential defendants in. This injustice is no less in administrative actions. In the present case, Petitioner was not apprised of the consequences of said permanent injunction. He was not informed that he could be put in criminal jeopardy without the benefit of constitutional and statutory safeguards. In fact, he was *not* chargeable with knowledge that direct disobedience of the consent decree could lead to contempt sanctions [*U.S. v. Rogers, supra* at 1135], as he had no counsel, as required by the Administrative Procedure Act [5 U.S.C. §555(b)], during the time he appeared before the SEC to sign the consent decree [*See also, Securities and Exchange Commission v. Higashi*, 359 F. 2d 550 (9th Cir. 1966) (the "right to counsel" provision of the Act applied, without discussion, to investigatory proceedings) and *Hannah v. Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960) (inferring that when federal administrative

regulatory agencies make determinations of a quasi-judicial nature, they are governed by the Act and the parties are to be accorded the traditional safeguards)]. When administrative agencies request injunctive relief consent decrees often result. The advantages of consent decrees to agencies are obvious. Yet, where such administrative agencies abuse their coercise power via injunctions [*See* Bemporal, "Injunctive Relief in SEC Civil Actions: The Scope of Judicial Discretion," 10 Col. J. L. & Soc. Prob. 328 (1974) and Freeman, "A Civil Libertarian Looks At Securities Regulation," 35 Ohio U. L. R. 280 (1974)] by failing to: (1) comply with the right to counsel provision of the administrative Procedure Act as in the present case; and (2) apprise the potential signees of such injunctions by consent of the full ramifications and consequences of entering into such consent decrees, the judicial act which such consent decrees constitute is deprived of the dignity it is entitled to [*See U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975)]. Also, the court's involvement in most consent decrees is so minimal, due to congested dockets and shortages of federal judges, that signees of said consent decrees do not even appear before said judges [See 17 C.F.R. §201.8]. The frequency of injunctive proceedings by the SEC is substantial. In 1974, the SEC instigated 148 injunctive cases, 289 injunctions were ordered, and 613 defendants were enjoined. 1974 ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION, p. 175 (1975). When it is realized that numerous other agencies also instigate injunctive type actions [See Appendix to the Opinion of the Court, *Hannah V. Larche, supra*], the magnitude of potential persons affected each year is greatly increased.

To avoid situations, such as the present case, where the rights of signees of consent decrees may be seriously impaired or deprived without their knowledge, this Court should exercise its supervisory power to require the District Courts to:

1 Inquire whether defendants, involved in consent decree proceedings instigated by agencies of the United States Government, are represented by counsel as required by 5 U.S.C. §555(b) [Administrative Procedure Act];

2 Inquire whether defendants, involved in consent decree proceedings instigated by agencies of the United States Government, are entering into said consent decree knowingly, willfully, and with full understanding of the potential ramifications of said consent decree and direct disobedience thereto; and

3 Apprise all defendants involved in consent decree proceedings, instigated by agencies of the United States Government, of the potential ramifications of entering into and of direct violation of said consent decree, if such defendants are not aware of the potential ramifications of said consent decrees and of direct disobedience thereto.

The above proposed standard would: (1) assure that the rights of signees of consent decrees are complied with; (2) increase the agencies' compliance not only with their regulations [with respect to the SEC, see 17 C.F.R. §§ 202.1 *et seq.*, 203.1 *et seq.*], but with standards of due process and fundamental fairness; while (3) increasing the involvement of the District Courts as a check on overzealous agency action [so that consent decrees will not be used by the SEC in a manner to circumvent the procedural requirements of Title 15 (see Br. of Appellant, Ground of Error #2, before the Fifth Circuit)]; and (4) justify reliance on the rule that a court's order is not subject to inquiry in contempt proceedings; while (5) increasing the likelihood of compliance with said consent decrees [deterrence being

obtained by full awareness of the consequences of non-compliance].[2]

If such a standard were adopted, then reliance on the rule refusing to allow an inquiry into the validity of a court's order in contempt proceedings would not deprive defendants of the fairness the Fifth Amendment contemplates. A simple hearing, which would require only that the District Judge ask the signee-defendant the above questions, would eliminate claims such as that herein. It would also justify the harsh penalties that out-of-court contempts often generate; the subsequent signing occurring in court under the eye of the District Judge, who would also sign the order at that time. It is believed that this hearing would not result in the excessive consumption of scarce judicial resources; the consumption of resources being more than outweighed by the positive benefits to be derived from the process.

Any challenges to the sufficiency of the "reading of consequences" by the court would necessarily be limited to material omissions by the District Courts, said omissions

[2]For instance, Rule 306 (a) (2), 17 C.F.R. §230.306(a) (2), states that once an injunction has been entered against a defendant, he is not allowed to offer securities subject to an exemption for a five year period of time. Rather, he must go through the entire registration procedure which is much more time consuming and far more costly. *See* Bromberg, "Corporate Securities and Documents," 28 Sw. L. J. 874 at n. 189(A) (1976). Thus, one example of the manner in which a Defendant can "disobey" a consent decree would be to issue securities which were legally exempt, but which he was legally forbidden to issue. Despite the presumption that a person knows the law, it is quite evident that even most attorneys are not acquainted with this rule. While it is not the Petitioner's posture that these type of rules should be pointed out to persons entering into consent decrees, it is indicative of the manner in which the SEC can circumvent the procedural safeguards of title 15. If at the time of the signing of the consent decree, the judge asked the questions proposed in this PETITION FOR CERTIORARI and advised the defendant to seek legal aid prior to any further involvement in the securities field, a trap would not be laid for the unwary but innocent businessman. Society is made better not only when criminals are apprehended, but when "crime" is prevented. These simple procedures may help eliminate crime and merit approval.

constituting error only if not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Thus, a simple inquiry by the District Court could rectify the numerous problems addressed above, while simultaneously protecting a defendant whose civil counsel may be unable to foresee the prospect of potential criminal liability arising out of the consent decree process. This would indeed provide a measure of due process commensurate with our system of criminal justice.

SUMMARY AND PRAYER

For the above stated reasons, a WRIT OF CERTIORARI should issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

EVERETT COLVIN,

GARY D. JACKSON,

COLVIN & JACKSON,
1600 Adolphus Tower,
Dallas, Texas 75202,
Attorneys For Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on this the ..... day of August, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D. C., 20530.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Tom R. ROGERS, Defendant-Appellant.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,

v.

CAPITAL OIL CORPORATION, etc., et. al., Defendants,

Tom R. Rogers, Defendant-Appellant.

Nos. 75-3010, 75-3098
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

July 8, 1976.

Appeals from the United States District Court for the Northern District of Texas.

Before GODBOLD, DYER and CLARK, Circuit Judges.

PER CURIAM:

[1, 2] In No. 75-3098, appellant Rogers seeks to have set aside a consent decree into which he entered enjoining him from various activities in the securities field. He claims that the decree was invalid because his counsel was ineffective, alleging that his attorneys (1) were representing codefendants with conflicting interests, and (2) did not advise him that criminal liability might result from defying the consent decree. Rogers relies primarily on Sixth Amendment standards governing the constitutional right to effective counsel

in criminal cases. The consent decree, however, was rendered in a civil proceeding, *SEC v. Mac-Elvain*, 417 F. 2d 1134, 1138 (CA5, 1969), *cert. denied*, 397 U.S. 972, 90 S.Ct. 1087, 25 L.Ed.2d 265 (1970), where such stringent standards do not apply. Cf. *SEC v. Hughes*, 481 F. 2d 401, 403 (CA2, 1973). Putting aside precedents governing the constitutional law of criminal procedure, then, we see no basis for overturning the injunction. The conflict of interest here was at most a potential one, since no actual prejudice was shown. And Rogers was chargeable with knowledge that direct disobedience of the consent decree could lead to contempt sanctions.

[3] Even if we were to agree that the consent decree was improperly rendered, the conclusion could not help Rogers in No. 75-3010, wherein he appeals from his contempt conviction. Under well-settled principles, the validity of the order he disobeyed was not open to question in the contempt proceeding. *U. S. v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *U. S. v. Leyva*, 513 F.2d 774, 776, (CA5, 1975).

[4] The second argument Rogers advances in the criminal case is that the government should have brought him to trial under the procedures generally applicable to securities law violators rather than under the more abbreviated procedures of the federal contempt statute, 18 U.S.C. §401. Insofar as this contention rests on constitutional grounds, it has been rejected in *U. S. v. Bukowski*, 435 F.2d 1094, 1099-102 (CA7), *cert. denied*, 401 U.S. 911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1970), and we see no need to amplify upon the Seventh Circuit's thorough analysis. Insofar as Rogers' argument consists in an assertion that the procedural steps of Title 15 (including reference to the Justice Department and indictment by a grand jury) supersede or take precedence over the procedures associated with the contempt statute, it is again without merit. Consent decrees would not be worth very much if every violation of them had to be prosecuted de novo

as a violation of the securities acts. We think it is safe to conclude that Congress did not intend for enforcement of the securities acts to be confined in this way.

The judgments appealed from are each AFFIRMED.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 75-3010
75-3098

U.S. COURT
OF APPEALS
FILED
JULY 30, 1976
EDWARD W.
WADSWORTH,
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TOM R. ROGERS
Defendant-Appellant.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

versus

CAPITAL OIL CORPORATION, etc., et. al.,
Defendants,

TOM R. ROGERS,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(JULY 30, 1976)

Before GODBOLD, DYER and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Tom R. Rogers in the above entitled and numbered cause be and the same is hereby denied.